83-1495

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

OPINION

THORSTEINN LAUFKVIST THORSTEINSSON, RAGNHEIDUR GUDRADSDOTTIR and RAGNHEIDUR THORSTEINSSON,

Petitioners

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 9, 1984

QUESTION PRESENTED

1. Does the Due Process Clause require at a minimum that an alien's counsel at a deportation hearing consult his client before waiving the only available defense available to his clients at a deportation hearing?

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CITATIONS

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

STATUTORY AND CONSTITUTIONAL CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Thorsteinn Laufkvist Thorsteinsson, Ragnheidur Gudradsdottir and Ragnheidur Thorsteinsson, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 3, 1984.

OPINION BELOW

The opinion of the Court of Appeals, as yet unreported, appears in the Appendix hereto as does the opinion of the Board of Immigration Appeals.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 3, 1984. A timely petition for rehearing was denied on February 6, 1984 and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under ?8 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION;

Amendment 5:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE, Title 8:

"§1105a. Judicial Review of orders of deportation and exclusion — Exclusiveness of procedure

(a) The procedure prescribed by, and all the provisions of sections 1031 to 1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, . . .

. . .

§1105a(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judical proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

. . .

"§1252 . . .

. . .

(b) A specal inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer

oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at the proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting

under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that –

. . .

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

STATEMENT OF THE CASE

All of the facts pertinent to this case are based on the uncontroverted testimony of petitioners at the exclusion hearing of May 14, 1981 and the exhibits admitted to that hearing. The Thorsteinssons are natives of Iceland. Following two vacations to this country the family inquired about migrating to the United States. App. 20, 60-1. Before applying to migrate, the Thorsteinssons sought advice of the American Consulate in Iceland. In late 1977, the vice-consul at the American Embassy advised petitioners that if they came to the United States and invested substantial sums of money into United States businesses, the family would have no problem obtaining immigrant visas within twelve to fourteen months. App. 61, 64, 69. The Thorsteinssons came to the United States and invested $40,000 in Tucson, Arizona. After returning to Iceland, on February 3, 1978, the family filled out applications for permanent resident status of business investors.

After making their initial investment in the United States, and after filing their application for immigrant visas, petitioners advised the American vice-consul in

Iceland that they intended to sell the bulk of their possessions and move to the United States. App. 63-5, 72. The American vice-consul then advised the petitioners that they could move to the United States to there await the final processing of their immigrant visa; and that they could enter the United States with their non-immigrant visas and obtain extensions of those visas until their permanent resident visas processing was completed. App. 64-5, 68-70.

After coming to the United States, the Thorsteinssons established residence in Tucson and continued to work and invest with the businesses in which they had invested money in early 1978. App. 62-3, 76-78. Every six months after their arrival petitioners obtained six-month extensions on their non-immigrant visas explaining each time to the Immigration and Naturalization Service that they were awaiting their immigrant visa. App. 72-3. In March, 1980, after obtaining three such extensions, the Thorsteinssons were denied further extensions and an order to show cause was issued to determine petitioners' deportability.

Petitioners retained the services of an attorney to defend against the deportation. The attorney was aware of the existence of the facts as stated above and that the petitioners came to this country in reliance on the advice of the American vice-consul in Iceland. The attorney never dicussed raising the defense of estoppel with the petitioners. App. 67-8. He subsequently sent an associate to the deportation hearing and the associate advised petitioners to concede deportability and waive their right to appeal. App. 52, 67. Petitioners followed their attorneys' advice. By stipulation petitioners were granted voluntary departure in lieu of deportation. Pursuant to

that stipulation the Thorsteinssons then left the United States.

Less than three weeks later, the Thorsteinssons attempted to re-enter the country on their non-immigrant visitor visas which they believed were still valid for multiple re-entries.[1] They were paroled into the country and an exclusionary hearing ordered. At the exculsionary hearing the petitioners appeared with new counsel and sought to either reopen their deportation hearing or collaterally attack their previous deportation hearing on the ground that their previous attorney's failure to raise an estoppel defense violated their right to a fair hearing and resulted in a gross miscarriage of justice. App. 48-51, 56-8.

At the exclusion hearing petitioners were found excludable as persons intending to immigrate without valid immigration visas. The administrative judge also refused to re-open the initial deportation hearing to allow the petitioners' new attorney to raise several defenses. A timely appeal was made by petitioners to the Board of Immigration Appeals and on August 18, 1982, the decision of the administrative judge was affirmed.

An appeal was filed in the Ninth Circuit Court of Appeals to review the refusal to reopen the deportation procedures pursuant to U.S.C. §1105a (a). In its opinion, the Court of Appeals recognized that "a limited exception" to the general rule that aliens outside the United States may not seek judicial review of their deportation proceedings exists where the deportation was in deroga-

[1] Petitioners were informed at the border that there were "problems" with their visas. At the exclusionary hearing they were notified that their visas had been cancelled and were forced to surrender them to the Immigration and Naturalization Service.

tion of the right to counsel and rights to due process of law. Although petitioners argued that their departure was in contravention of due process as they had not received effective assistance of counsel, the Court of Appeals held that the decision of the petitioners' first attorney not to raise their only defense was "tactical" and that therefore there was no denial of due process.

A petition for rehearing was filed and subsequently denied by the Ninth Circuit Court of Appeals and then this petition for Writ of Certiorari was filed. The respondent has agreed to stay any effort to remove the petitioners from this country pending the issuance of the mandate from the Court of Appeals upon the resolution of this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT ISSUES CONCERNING THE MINIMUM STANDARDS OF DUE PROCESS TO BE AFFORDED AN ALIEN AT A DEPORTATION HEARING.

The Court of Appeals decision raises serious questions regarding whether as a minimum requirement of due process, counsel at a deportation hearing must consult with his client before waiving an alien's only defense to deportation.

By holding that the decision by petitioners' first attorney not to raise their only defense in the deportation hearing was merely tactical, the Court of Appeals overlooks the uncontested fact that these alien-clients did not know about or consent to the decision. The alien-client's intelligent participation in his own defense is the foundation upon which any determination of due process rights and rights of assistance of counsel must

be based. The absence of any participation in the fundamental decisions that are being reviewed in this case break the link between the alien-client and the exercise of his due process rights and constitutes a fatal flaw in the Court of Appeals decision.

An alien's right to a procedurally fair deportation hearing is required by the Due Process Clause. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950); *Kessler v. Strecker*, 307 U.S. 695 (1939). Recently, in the context of an exclusion hearing, this Court remanded a case to determine whether the hearing provided to an alien was fair. *Landon v. Plasencia*, 454 U.S. 1140 (1982). In *Landon*, this Court specifically remanded the case to see whether Plasencia had "an opportunity to present her case *effectively*." (emphasis added)

At any deportation hearing, the right to be represented by counsel is crucial to ensuring a fair hearing. This Court has often recognized that deportation is a drastic sanction that may inflict "the equivalent of banishment or exile," *Barber v. Gonzales*, 347 U.S. 637, 642-34 (1954) and may result in the loss of "all that makes life worth living." *Bridges v. Wixon*, 326 U.S. 135, 147 (1945). It is for these reasons that whenever an alien, who is often unfamiliar with the laws or even the language of this country, is faced with deportation, he is statutorily entitled to retain counsel. 8 U.S.C. §1252 (b)(2)

The right to counsel is so important to a fair hearing that it has been held that if there has been an unintelligent waiver of the right and if the presence of counsel "might have" affected the outcome of the proceeding, the alien is entitled to a new deportation hearing. *Partible v. Immigration and Naturalization Service*, 600

F.2d 1094 (5th Cir. 1979); see *Ballenilla-Gonzales v. Immigration and Naturalization Service*, 546 F.2d 515, 520 (2nd Cir. 1976). *Aguilera-Enriquez v. Immigration and Naturalization Service*, 516 F.2d 565 (6th Cr. 1975); *Burquez v. Immigration and Naturalization Service*, 513 F.2d 751 (10th Cir. 1975); *Rosales-Caballeros v. Immigration and Naturalization Service*, 472 F.2d 1158 (5th Cir. 1973).

Decisions of the Courts of Appeal have held that this right to counsel includes the right to minimally effective counsel. In *McLeod v. Peterson*, 283 F.2d 180 (3rd Cir. 1960) counsel at a deportation hearing failed to correct a ruling by the immigration judge that his clients were ineligible for discretionary relief. The Appellate Court recognized the error to be obvious and clear and was unsure why the issue was never appealed. 283 F.2d at 184-5. Holding that the deportation hearing must be reopened the Court of Appeals stated that

> "where a holding that the individual litigant was bound by the failures of his counsel or of the officials involved would result in a gross miscarriage of justice, such proceedings should be reopened and corrective measures taken." 283 F.2d at 184.

See also *Paul v. Immigration and Naturalization Service*, 521 F.2d 194, 198 n.5 (5th Cir. 1975); *Rose v. Woolwine*, 344 F.2d 993 (4th Cir. 1965) (alien entitled to a new hearing with counsel to have the opportunity to rebut damaging evidence regarding her moral character).

Petitioners' rights to due process were neither recognized nor applied to the instant case by the administrative law judge who presided over the petitioners' exclu-

sion hearing. After hearing the testimony and observing the credibiltiy of petitioners, the administrative law judge held that the petitioners had "perhaps been mislead as to the difficulties of obtaining permanent residence in the United States . . ." App. 38-9. Nonetheless he held that he could not decide the claims of estoppel or lack of effective counsel because of the limited jurisdiction of an exclusion hearing. He essentially held that the only issue he could decide was whether or not the petitioners had proper immigrant visas. App. 39. His decision was affirmed by the Board of Immigration Appeals. App. 26-34.

The erroneous nature of the administrative law judge's decision was recognized, but uncorrected, by the Court of Appeals for the Ninth Circuit. The opinion of that Court specifically noted that jurisdiction exists to review a "wrongful" deportation. App. 22-3, *Mendez v. Immigration and Naturalization Service*, 563 F.2d 956 (9th Cir. 1977). The Court noted that a deportation in derogation of the right to counsel is not a lawful "departure" of the alien from the United States and that an alien outside of the United States may petition for judicial review of his deportation when his departure was not "legally executed". *Estrada-Rosales v. Immigration and Naturalization Service*, 645 F.2d 819, 820-21 (9th Cir. 1981). App. 23.

The Court of Appeals seeks to reconcile this conflict between the applicable law and the decision of the Administrative Law Judge, as affirmed by the Board of Immigration Appeals, by holding that the decision not to raise petitioners' estoppel defense was merely "tactical" and therefore did not impinge upon the petitioners' due process rights. Petitioners submit that this factual

determination that the decision by the first attorney not to raise the only defense available to petitioners was tactical is contrary to and unsupported by the record in this case and the initial determination of the Administrative Law Judge.

The uncontested facts of this case establish that the petitioners were not consulted by their first attorney regarding the availability of a defense based upon estoppel or the decision not to raise such a defense. The potential defense based upon estoppel was in fact the only defense available to the petitioners yet they were not aware that the decision not to raise this defense had been made at the time they agreed to leave the United States. They were unaware of the availability of the defense. As demonstrated by their attempt to return three weeks later they were obviously unaware of the impact and consequence of the decision which had been made on their behalf.

Under such circumstances it was impossible for the petitioners to make any "tactical" decision to waive their only defense, and impossible for them to do so with assistance of counsel. Indeed, they made no such decision. Effective assistance of counsel is predicated upon discussions of strategies and tactical choices between an attorney and his clients. *Starnes v. McGuire*, 512 F.2d 910 (D.C. Cir. 1974)[2]

[2] Frequent analogies to effective assistance of counsel in criminal proceedings pursuant to the Sixth Amendment to the Constitution have been used for guidance by the lower courts. See *Rodriguez Gonzales v. Immigration and Naturalization Service*, 640 F.2d 1139 (9th Cir. 1981); *Castaneda-Delgado v. Immigration and Naturalization Service*, 525 F.2d 1295, 1300 (7th Cir. 1975); *Paul v. Immigration and Naturalization Service*, 521 F.2d 194 (5th Cir. 1975); *McLeod v. Peterson*, 283 F.2d 180, 184-85 (3rd Cir. 1960). Moreover, criminal cases makes it clear that the failure to raise the colorable defense available to a defendant constitutes ineffective assistance of counsel. *Polk County v. Dodson*, 454 U.S. 312, 323 (1981); *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962); See *Davis v. Alabama*, 596 F.2d 1214 (5th Cir. 1979).

Moreover, petitioners were in no position to intelligently decide whether to waive their only defense. *Effective* assistance of counsel would have enabled them to make such a decision, but they did not have effective assistance. As such the decision cannot be merely dismissed as "tactical" and petitioners are entitled to a new deportation hearing. *Partible v. Immigration and Naturalization Service, supra.*

2. THE REFUSAL TO REVIEW PETITIONERS' OPPORTUNITY TO PARTICIPATE IN THEIR OWN DEFENSE DENIED PETITIONERS MINIMAL DUE PROCESS

The facts of this case demonstrate that the Thorsteinssons never had the opportunity to participate or determine their own defense to the deportation proceedings. Nor have the petitioners ever had the opportunity to raise and have a hearing upon the merits of their claim of estoppel. At the original deportation hearing that defense was waived by their first attorney without their knowledge or consent. At the subsequent exclusion hearing the estoppel claims were held to be irrelevant to the narrow issue of whether they actually possessed immigrant visas.

Petitioners were denied any opportunity to prove that they moved to and invested in the United States because they relied upon assurances of the American vice-consul that they would soon receive immigrant visas. They were also denied any opportunity to prove that they entered the United States on non-immigrant visas and then lived in the United States while those non-immigrant visas were extended with the knowledge

and concurrence of the Immigration and Naturalization Service.[3]

While the parameters of the application of estoppel against the government have never been spelled out, *Schweiker v. Hansen*, 450 U.S. 785, 789 n.4 (1981), the Ninth Circuit Court of Appeals correctly recognized that estoppel would have been a "potential defense" to the deportation of these petitioners. App. 24.

The elements of estoppel have been listed as affirmative misconduct by the Government, detrimental reliance by the party asserting estoppel and that the application of estoppel does not impair national policy. *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975); *Akbarin v. Immigration and Naturalization Service*, 669 F.2d, 839 (1st Cir. 1982). In the instant case, if the claims of the Thorsteinssons are true, all such elements exist. Clearly, petitioners had a right to rely on the vice-consul as the consular official in charge of issuing visas. 8 U.S.C. §1101 (a)(9). It was affirmative misconduct for the vice-consul to make promises and assurances to petitioners. Petitioners' reliance was extremely detrimental as they invested their savings into the United States, sold the bulk of their belongings, uprooted from their native Iceland and moved to this country.

Throughout the lower courts far less compelling facts have been held sufficient to invoke the doctrine of

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[3] The Petitioners' held B-1 non-immigrant visas which are conditioned upon the fact that an alien does not intend to permanently reside in the United States. Petitioners have alleged that they fully informed the American Consulate in Iceland and the Immigration and Naturalization Service that they intended to move permanently to the United States and were never told it would be improper to do so on non-immigrant visas or extensions of those visas.

equitable estoppel against the Government. *Akbarin v. Immigration and Naturalization Service, supra; Tejeda v. Immigration and Naturalization Service,* 346 F.2d 389 (9th Cir. 1965); see *Carniel-Rodriguez v. Immigration and Naturalization Service,* 432 F.2d 301 (2nd Cir. 1971) (estoppel invoked based on misconduct of American Consulate.)

In *Akbarin v. Immigration and Naturalization Service, supra,* a non-immigrant alien faced deportation charges on the ground that he had obtained employment without the authorization required by law. Mr. Akbarin claimed that his employer telephoned an unnamed INS official while standing in his presence and that the immigration official had stated that Akbarin could lawfully work up to 20 hours per week. In remanding the case back to the immigration judge, the Court held that a colorable claim of estoppel did exist as there was evidence that "INS induced Akbarin to change his position or Akbarin reasonably relied on INS statements that caused him to change his position, either of which estops the INS from deporting him and his wife."

In addition, the fact that petitioners were granted three extensions of their non-immigrant visas by the Government despite the immigration official's knowledge that they were in this country waiting for visas with which to migrate should work an estoppel. Despite the Government's knowledge that petitioners sought to migrate, they routinely extended their non-immigrant visas. If the knowledge that petitioners intended to migrate was going to be used against them to deny them an extension of their non-immigrant visas it should have been used against them when they sought the first such extension not after they were given three extensions and became more and more settled in the United States.

An analogous situation occurred in *Gestavo v. District Director of Immigration and Naturalization Service*, 377 F. Supp. 1093 (D.Colo, 1971). In *Gestavo*, the Government refused to grant an extension for an alien's visa after it was learned that the visa should never have been issued in the first place. The Court held that Gestavo, once admitted, could rightfully assume that information known to the Immigration and Naturalization Service at the time he obtained his visa would not later be used against him to deny him an extension. The situation is similar to the case at bar.

The failure of petitioners' counsel to raise this defense at the petitioners' deportation hearing without consulting petitioners as to its existence denied petitioners a fair hearing. This was the only defense available to the petitioners and because of their ineffective assistance of counsel they have been denied an opportunity to prove these events. The subsequent refusal by the Immigration Judge presiding at the petitioners' exclusion hearing to determine the validity of the original deportation proceedings closed the door on any further opportunity for the petitioners to present their claim and insured that they were denied due process.

CONCLUSION

As the Court recognized in *Landon v. Plasencia, supra*, there must be some minimum procedural safeguards at a deportation or exclusion hearing in order for the procedure to comport with due process. At a minimum the petitioners surely should have had an opportunity to raise their only defense before they were to be deported or excluded from a country in which they have invested so much. In light of the substantial federal quesion regarding whether minimum due process stan-

dards require that an alien-client be aware of and intelligently participate in major decisions regarding his defense at deportation proceedings prior to waiving his rights and whether due process requires the opportunity to effectively present defenses in deportation and exclusion hearings, petitioners respectfully pray that this petition for writ of certiorari be granted.

Respectfully submitted this 5th day of March, 1984.

MESSING & GLICKSMAN, P.C.

By _____
ELLIOT GLICKSMAN

By _____
MICHAEL W. L. MCCRORY

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-7720

OPINION

THORSTEINN LAUFKVIST THORSTEINSSON, RAGNHEIDUR QUDRADSDOTTIR and RAGNHEIDUR THORSTEINSSON,
Petitioners,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of the Board of Immigration Appeals Argued and Submitted October 11, 1983

BEFORE: WALLACE, SCHROEDER, and FERGUSON, Circuit Judges.

WALLACE, Circuit Judge:

Three Icelandic citizens (the Thorsteinssons) petition for review of an order of the Board of Immigration Appeals (the Board) denying their motion to reopen their prior deportation proceedings. Because the Thorsteinssons failed to exhaust their administrative remedies and departed from the United States before seeking judicial review of the Board's order, we conclude that we lack jurisdiction to hear this petition.

I

The Thorsteinssons are natives and citizens of Iceland. Following two vacations in the United States, the Thorsteinssons decided to immigrate to this country. They claim to have sought advice about immigration from personnel at the United States embassy in Reykjavik, Iceland. According to the Thorsteinssons, the embassy personnel told them that investing in American business would be the best way to obtain immigrant visas. In February 1978, the Thorsteinssons entered the United States with nonimmigrant visas and invested substantial sums in an Arizona business. They applied to become lawful permanent residents of the United States. The Thorsteinssons claim the embassy personnel in Iceland told them that they would obtain their immigrant visas approximately twelve to fourteen months after making their application. The Thorsteinssons state they entered the United States believing they would be able to obtain extensions of their nonimmigrant visas until they received immigrant visas. In March 1980, approximately two years after the Thorsteinssons' entry into the United States, the Immigration and Naturalization Service (INS) denied their request for further extension of stay in the United States.

The Thorsteinssons did not depart by the specified time and faced a deportation hearing in August 1980. At the hearing, their counsel conceded deportability and informed the immigration judge that the Thorsteinssons had entered into a stipulation with the INS allowing them nine months in which to depart voluntarily from the United States. The immigration judge ratified the stipulation, finding the Thorsteinssons deportable and granting them nine months to leave the United States. The Thorsteinssons did not appeal the immigration

judge's decision. Following a sixty-day extension of their voluntary departure period, the Thorsteinssons left the United States.

Less than three weeks later, the Thorsteinssons attempted to reenter the United States as nonimmigrant visitors. They were paroled into the United States pending a review of their immigrant files. At an exclusion hearing, the Thorsteinssons appeared with new counsel and attempted to reopen their deportation proceedings. They claimed that their previous counsel's failure to raise a defense based on equitable estoppel denied them effective assistance of counsel in violation of their due process rights and rendered their prior deportation hearings a gross miscarriage of justice. The immigration judge held that the deportation proceedings could not be ordered reopened in the exclusion hearing because the Thorsteinssons were technically outside of the United *States.*[1] The judge also held the Thorsteinssons excludable because they were immigrants without proper visas. The Board affirmed the immigration judge's actions and denied the Thorsteinssons' request to reopen their deportation proceedings.

The Thorsteinssons first sought judicial review by filing a writ of habeas corpus in the United States District Court pursuant to 8 U.S.C. § 1105a(b). The district court concluded it lacked jurisdiction to reopen the deportation proceedings in its habeas corpus review of the exclusion hearing. The Thorsteinssons then filed the present petition for review of the Board's denial of their request to reopen the deportation proceedings.

II

The admission and exclusion of aliens is a matter vested almost exclusively in the executive and legislative

branches of the federal government. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Ventura-Escamilla v. INS*, 647 F.2d 28, 30 (9th Cir. 1981). Accordingly, judicial review in immigration cases is limited to those matters "authorized by treaty or by statute, or . . . required by the paramount law of the Constitution." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976), *quoting Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893). Under section 106(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1105a(c), our review of deportation proceedings is extremely limited.

> An order of deportation or of exclusion *shall not be reviewed by any court* if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

8 U.S.C. § 1105a(c) *(emphasis added)*. A similar administrative regulation precludes immigration judges and the Board from considering a motion to reopen deportation proceedings after an alien has departed from the United States. 8 C.F.R. § 3.2 (1983).

Although the Thorsteinssons voluntarily left the United States, they were "deported" for purposes of the Act. 8 U.S.C. § 1101(g). They remained technically outside of the country during their "parole" pending the resolution of their exclusion proceedings. *See* 1 C. Gordon & H. Rosenfield, *Immigration Law and Procedure*, § 2.54 (1983). It is also clear that they failed to exhaust their administrative remedies by not appealing the immigration judge's order in their deportation proceedings. Judicial review of their deportation order thus appears to be precluded by the plain language of 8 U.S.C. § 1105a(c). *See Ramirez-Juarez v. INS*, 633 F.2d 174, 176 (9th Cir. 1980); *Hernandez-Almanza v. United*

States Dept. of Justice, 547 F.2d 100, 103 (9th Cir. 1976); 2 C. Gordon & H. Rosenfield, *Immigration Law and Procedure*, § 8.8, at 8-57 to 8-58 (1983). *Cf. Braude v. Wirtz*, 350 F.2d 702, 706 (9th Cir. 1965) (nonresident aliens have no standing to seek judicial review of administrative actions under the act).

In *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977), we recognized a limited exception to the general rule that non-resident aliens may not seek judicial review of their deportation proceedings. *Mendez* involved a "wrongful" deportation of a permanent resident alien without notice to his counsel. We held that this deportation in derogation of the right to counsel established by 8 U.S.C. § 1252(b) was not a "departure" for purposes of 8 U.S.C. § 1105a(c). Instead, we concluded that departure sufficient to preclude subsequent judicial review meant "legally executed" departure and not "departure in contravention of due process." *Id.* at 958. Thus, an alien outside of the United States may petition for judicial review of his deportation when his departure was not "legally executed." *Estrada-Rosales v. INS*, 645 F.2d 819, 820-21 (9th Cir. 1981).

The Thorsteinssons assert that their departure was not legally executed because their first attorney's failure to raise the doctrine of equitable estoppel at their deportation hearing denied them effective assistance of counsel in violation of their due process rights. *See Paul v. United States Immigration and Naturalization Service*, 521 F.2d 194, 198 (5th Cir. 1975). We disagree. In concluding that the Thorsteinssons were not denied effective assistance of counsel, the Board's order discussed at length the applicability of the estoppel defense to the facts of the present case. The briefs of the Thorsteinssons

and the INS also dispute the applicability and merit of the estoppel defense. We find it unnecessary to resolve these issues. Under the circumstances of this case, the failure of the Thorsteinssons' attorney to raise the defense of equitable estoppel at their deportation hearing did not impinge upon the fundamental fairness of the deportation proceedings.

In *Rodriguez-Gonzales v. INS*, 640 F.2d 1139 (9th Cir. 1981), we rejected a similar contention of ineffective assistance of counsel. There, the aliens' attorney voluntarily admitted facts sufficient to support their deportation, and focused his attention instead on a labor law defense. We concluded that "[t]his sort of tactical decision, even if in hindsight unwise, does not constitute ineffective assistance." *Id.* at 1142.

In the present case, the Thorsteinssons' first attorney also made a tactical decision not to raise a potential defense. Although the record clearly shows that he was aware of all the facts supporting the arguable defense of equitable estoppel, he chose not to raise that defense. By entering into a stipulation with the INS instead of contesting the Thorsteinssons' deportability, the attorney was able to secure an extended period during which the Thorsteinssons could liquidate their assets in an orderly fashion and still voluntarily leave the country. As in *Rodriguez-Gonzales*, this tactical decision did not constitute ineffective assistance of counsel. We therefore hold that the Thorsteinssons were not denied due process at their deportation hearing and that their subsequent departure was "legally executed" for purposes of 8 U.S.C. § 1150a(c).

In light of our conclusion that the Thorsteinssons departed from the United States prior to the filing of

this petition, we have no jurisdiction to review the Board's order. *Ramirez-Juarez v. INS*, 633 F.2d at 176; *cf. Ventura-Escamilla v. INS*, 647 F.2d at 32 (court may not substitute its judgment for that of the immigration officials in matter where court lacks statutory jurisdiction). We do not, therefore, address the other issues raised by the parties.

The petition for review of the Board's order is DISMISSED.

FOOTNOTE

1. The immigration laws create two types of proceedings in which aliens can be denied the hospitality of the United States: deportation hearings and exclusion hearings. "The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admisson." *Landon v. Plasencia*, 103 S. Ct. 321, 325 (1982) (citations omitted). Although the INS may "parole" a nonresident alien into the United States pending determination of the alien's admissibility, the alien is still deemed to be outside of the United States. 1 C. Gordon & H. Rosenfield, *Immigration Law and Procedure*, § 2.54 (1983).

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

18 Aug. 1982

Files: A22 994 732 – Tucson
A22 994 900
A22 994 901

In re:

THORSTEINN LAUFKVIST *THORSTEINSSON*
RAGNHEIDUR *GUDRADSDOTTIR*
RAGNHEIDUR *THORSTEINSSON*

IN EXCLUSION PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT:

Elliot Glicksman, Esquire
Messing & Glicksman, P.C.
1660 Arizona Bank Plaza
33 North Stone Avenue
Tucson, Arizona 85701

ON BEHALF OF SERVICE:

Jane Gersbacher
General Attorney
Thomas Fong
Acting Appellate Trial Attorney

ORAL ARGUMENT: April 22, 1982

EXCLUDABLE: Sec. 212(a)(20), I&N Act. [8 U.S.C. 1182(a)(20)] – Immigrants not in possession of valid immigrant visas

APPLICATION: Admission to the United States as nonimmigrants

This matter is before the Board on appeal from the immigration judge's decision of May 14, 1981, finding the applicants excludable from admission to the United States as immigrants not in possession of valid immigrant visas under section 212(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(20). The appeal will be dismissed.

The applicants are natives and citizens of Iceland, a husband and wife and their seven-year-old daughter. They applied for admission to the United States as nonimmigrant visitors on March 18, 1981, being in possession of valid nonimmigrant visas. At that time they were paroled into the United States pending these exclusion proceedings to determine their admissibility. At the hearing on May 14, 1981, the adult applicants testified that they own a business in the United States which they had purchased for over one-half million dollars and which they intended to continue to operate; that they still own a house in the United States; that their daughter is enrolled in school; and that they intend to remain in the United States and have no plans to depart. Counsel also stipulated that their daughter's admissibility depends upon that of her parents. Based upon the foregoing, the immigration judge correctly found that the applicants are excludable from admission to the United States under section 212(a)(20) of the Act as intending immigrants not in possession of valid immigrant visas.[1]

The record also reflects that the applicants have previously entered the United States as nonimmigrant

[1] The fact that the applicants presented valid *nonimmigrant* visas has no bearing upon this finding.

visitors. On August 25, 1980, they were found to be deportable as nonimmigrant overstays but were granted the privilege of voluntary departure in lieu of deportation. They effected a timely departure thereafter. Counsel now seeks to use these exclusion proceedings as a forum in which to compel reopening of the applicants' previous deportation hearing and challenge the validity of the immigration judge's fnding of deportability therein.

The applicants state that when they came to the United States classified as nonimmigrant visitors in 1978 they intended eventually to become lawful permanent residents based upon a business investment in the United States. They claim that the American Consul in Iceland advised them that they could submit an investor application, proceed to the United States as nonimmigrants and subsequently return to Iceland to obtain immigrant visas when nonpreference visa numbers became available, approximately 12-14 months later. They allege that they relied on this advice, only to discover later that nonpreference numbers became unavailable indefinitely before their priority date was ever reached, thereby precluding their acquisition of permanent resident status. Therefore, counsel now argues that in the applicants' earlier deportation proceedings the Government ought to have been estopped from finding them to be deportable and denying them permanent residency. He also contends that the failure of the applicants' former counsel to raise this estoppel claim in those deportation proceedings constitutes ineffective assistance

of counsel which now requires – in this exclusion context – that the applicants be permitted to reopen those deportation proceedings in order to present their case for estoppel.[2] We reject this contention.

The general rule is that a deportation order cannot be challenged after the alien has departed from the United States. Section 106(c) of the Act, 8 U.S.C. 1106(c), provides, in pertinent part: "An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order." Likewise, federal regulations at 8 C.F.R. 3.2 provide that, "A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States." However, a collateral attack upon prior deportation proceedings may be allowed in subsequent deportation proceedings if it is "shown convincingly that *fundamental errors* have been committed in prior proceedngs . . . , and where a holding that the individual litigant was bound by the failures of his counsel or of the officials involved would result in a *gross miscarriage of justice*, such proceedings should be reopened and appropriate corrective measures taken." (Emphasis supplied). *McLeod v. Peterson*, 283 F.2d

[2] It must be recognized that but for this alleged estoppel bar, the applicants were clearly deportable as charged and were granted the only available relief, voluntary departure. No additional "alternatives" were then open to them which could have been raised on appeal or otherwise. They were faced with only two options: either effect a timely departure or remain longer and be deported. Thus, counsel's other arguments implicating these "issues" are premised entirely upon the estoppel foundation and must rise or fall with the acceptability of his request to reopen the deportation proceedings due to the ineffective assistance of former counsel for failure to raise the estoppel claim. Accordingly, we do not treat these ancillary matters separately.

180, 184 (2d Cir. 1960); *see also Ramirez-Juarez v. INS*, 633 F.2d 174 (9th Cir. 1980); *Steffner v. Carmichael*, 183 F.2d 19 (5th Cir. 1950); *Matter of Farinas*, 12 I&N Dec. 467 (BIA 1967); *Matter of Malone*, 11 I&N Dec. 730 (BIA 1966). This showing clearly goes well beyond a mere "reversible error" standard of review.

Preliminarily we note that an alien "is not constitutionally entitled to a perfect deportation proceeding and that errors in the deportation proceeding do not necessarily constitute a denial of due process, *see, e.g., Burquez v. INS*, 513 F.2d 751 (10th Cir. 1975); *Jolley v. INS*, 441 F.2d 1245 (5th Cir. [1971]), *cert. denied* 404 U.S. 946 [1971]." *U.S. v. Floulis*, 457 F.Supp. 1350, 1353 (W.D.Pa. 1978).

Assuming, without deciding, that an alien applicant for admission to the United States may attack a prior deportation order in subsequent exclusion proceedings, we find no "gross miscarriage of justice" to have occurred in the prior deportation proceedings of the instant applicants.

With regard to the applicant's estoppel claim, we first find that the applicants have failed to prove that the American Consul misadvised them and "guaranteed" that were they to follow the procedure he prescribed they would inevitably and automatically obtain permanent resident status. There is a legal presumption that the consular official performed his duty correctly. *Matter of Reimer*, 12 I&N Dec. 443, 444 (BIA 1967). As counsel conceded at oral argument, the applicants' claim is based solely upon their own statements. This is insufficient to overcome the presumption of regularity. *See id.; Corniel-Rodriguez v. INS*, 532 F.2d 301 (2d Cir. 1976) (where there was additional evidence of record to corroborate

the alien's testimony concerning the American Consul's conduct). Contrary to the applicants' statements, it is more likely that they simply misunderstood the American Consul's comments regarding the nonpreference investor process and his anticipation that their priority date should be reached within approximately 12-14 months. Such advice was accurate at the time, and the official could not be expected to foresee that nonpreference visa numbers would subsequently become unavailable.

Second, assuming *arguendo* that the Board has authority to even invoke estoppel against the Government and that the American Consul advised the applicants as they claim, that conduct does not support application of the estoppel doctrine. The Supreme Court has left unanswered the question whether, in some circumstances, the Government may be estopped by the "affirmative misconduct" of its employees. *See INS v. Hibi*, 414 U.S. 5, 8-9 (1973); *Montana v. Kennedy*, 366 U.S. 308, 314-315 (1961); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *see also Miranda v. INS*, 673 F.2d 1105 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3009 (U.S. July 7, 1982) (No. 82-29). Whatever the resolution of that question, it is clear that no such "affirmative misconduct" would exist under the facts alleged here. For example, in *Hansen*, a Government employee misadvised Hansen regarding certain eligibility requirements for social security benefits and breached his duty to encourage her to file a written application for benefits for which she was eligible; nevertheless, the Supreme Court concluded that such conduct fell "far short" of that which might require estoppel and did not amount to affirmative misconduct. We find that the alleged action here of the American Consul falls even farther

short of that necessary to invoke estoppel and does not constitute "affirmative misconduct."[3]

Finally, the applicants have suggested that estoppel should apply because of the Service action in extending their stay as nonimmigrants. This argument is totally baseless. When the extensions were granted, the male applicant assured the Service that he was not working in the United States, that he had a manager to operate his United States business, that he owned a home in Iceland, and that they intended to return to Iceland regularly and would obtain any subsequently-issued immigrant visas there. Thus, the applicants fully understood that their extensions of nonimmigrant stay in no way would entitle them to remain permanently in the United States or somehow transform them to a permanent resident status. Accordingly, the applicants have failed to establish a valid claim of estoppel under either of their two theories.

We also find the applicants' allegations of ineffective assistance of counsel to be without merit. In general, litigants are bound by the conduct of their attorneys absent egregious circumstances. *Kung v. Fom Investment Corp.*, 563 F.2d 1316, 1318 (9th Cir. 1977); *U.S. v. Guerra de Aguilera*, 600 F.2d 752, 753 (9th Cir. 1979). The applicants' argument is grounded solely upon their former counsel's failure to raise an allegedly sound defense of estoppel. However, we have already determined that the applicants' estoppel claim is invalid; thus, coun-

[3] It cannot be disputed that the applicants have never been eligible to become permanent residents as nonpreference investors due to the unavailability of nonpreference visa numbers, which resulted solely by operation of the statutory scheme devised by Congress. Estoppel is essentially a form of equitable relief, and we perceive no justification for resort to principles of Equity so that the applicants may be accorded benefits for which they clearly are not eligible — thereby undermining the immigration pattern prescribed by Congress. *See Kwon v. INS*, 646 F.2d 909 (5th Cir. 1981)

sel's failure to raise estoppel can hardly be said to have been a material error, let alone a gross miscarriage of justice. Moreover, estoppel merely constitutes an affirmative defense to the applicants' previous clear deportability as nonimmigrant overstays. And, as noted earlier, the entire issue of estoppel against the Government remains unsettled. We know of no rule which requires counsel to raise every conceivable argument which may possibly benefit his client, particularly when it is based upon an affirmative defense.[4] Accordingly, we find that the mere election of the applicants' former counsel not to assert the affirmative defense of estoppel – which we have concluded to be without merit and whose applicability and availability is, at best, unsettled – hardly rises to the level of an "egregious circumstance" or "fundamental error" so as to create a manifest "gross miscarriage of justice."[5]

In view of all the foregoing, we find that the applicants may not now seek to reopen their prior deportation proceedings and collaterally attack its validity on grounds of ineffective assistance of counsel through

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[4] *See, e.g., Burr v. INS*, 350 F.2d 87 (9th Cir. 1965), *cert. denied*, 383 U.S. 915 (1966), where an alien who could have raised defenses in a prior deportation hearing but failed to do so was not entitled to subsequently challenge that deportation.

[5] It should also be recognized that the applicants "voluntarily chose [their attorney] as [their] representative in the action, and [they] cannot now avoid the consequences of the acts or omissions of that freely selected agent." *Link v. Wabash Railroad Company*, 370 U.S. 626, 633-34 (1962); *see Chism v. National Heritage Life Insurance Co.*, 637 F.2d 1328 (9th Cir. 1981).

failure to raise the defense of estoppel. The applicants are clearly excludable from admission to the United States under section 212(a)(20) of the Act. The immigration judge's decision was proper.

ORDER: The appeal is dismissed.

DAVID L. MILHOLLAN
Chairman

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Tucson, Arizona

May 14, 1981

File No. A22 994 732
A22 994 900
A22 994 901

In the Matter of
Thorsteinn Laufkvist THORSTEINSSON)
Ragnheidur GUDRADSDOTTIR)
Ragnheidur THORSTEINSSON)
Applicants)

In Exclusion Proceedings

CHARGE: I&N Act Section 212(a)(20) Immigrants not in possession of a valid immigrant visa.

APPLICATION: Admission as nonimmigrants

ON BEHALF OF APPLICANTS:
Elliot Glicksman, Esq.
William Messing, Esq.
33 North Stone, Suite 1680
Tucson, Arizona

ON BEHALF OF SERVICE:
Jane Gersbacher, Esq.
Trial Attorney
Los Angeles, California

ORAL DECISION OF THE IMMIGRATION JUDGE ENTERED 05-14-81

The applicants are natives and citizens of Iceland who applied for admission to the United States at El

Paso, Texas on or about March 18, 1981. It appeared to the inspecting Immigrant Inspector that they were not clearly admissible to the United States. Their inspection was deferred and they were eventually accorded a hearing before an Immigration Judge.

The applicants are husband and wife and a six-year old daughter.

At the time of their application for admission on March 18, 1981 the male applicant was in possession of a passport valid until June 11, 1986 and had in this passport a nonimmigrant visa under a B-2 classification. The visa was issued June 15, 1976 and was valid indefinitely for multiple entries. The female respondent had a similar type visa in her passport. The daughter was listed as a child, which would be the daughter of the applicants. The nonimmigrant visas have a cancellation notation on them, put there on April 8, 1981. The cancellation was apparently made by an Officer in the Phoenix District (See Exhibit 5).

The female applicant testified that they have been living in Tucson for approximately two years. They first came to the United States in 1973 on a visit and again in 1976 they came for another visit. In 1976 they found a liking in the United States and looked for a way in which they could permanently remain in the United States. They were advised that the two ways in which they might come to the United States permanently was by investing the sum of $10,000 or more, or by the male respondent obtaining a labor certification. Since the applicants had the money, they felt that the best avenue would be by an investment. In 1977 they went to the American Consul in Iceland, who told them there was about a twelve to fourteen month delay, but otherwise

there appeared no problem. They came to the United States and purchased a KOA campground. The total purchase price of this campground was approximately $550,000, of which the initial payment was $25,000. Eventually they invested a total of $120,000. They returned to Iceland and filed an application as an investor with the American Consul in Iceland (Exhibit 9). This application was submitted on February 3, 1978. Approximately four days later they came to the United States as nonimmigrant visitors (See Exhibit 6). They were granted extensions of stay until February 6, 1980, and when they were unable to get any further extensions and they failed to depart from the United States, they were put under deportation proceedings. The deportation proceeding (Exhibit 6) was held on August 25, 1980 and they were granted until January 5, 1981 within which to depart voluntarily from the United States. The deportation proceeding was very summary in nature and the respondents did not take an appeal from that decision. They were represented by John C. Richardson. The attorney advised them that there was no alternative but to leave the United States. He examined their passports and noted that the nonimmigrant visas were still valid and apparently they left the United States for Mexico and within two or three weeks made application for readmission since their nonimmigrant visas were valid indefinitely and for multiple entries they apparently felt that they could reenter the United States with no difficulty.

In the hearing today, both applicants testified that it was their desire to remain in the United States, if possible. The male respondent testified that he is attempting to dispose of his business. The daughter is in school. It has been their objective since they purchased

the business to try to get permanent residence on what they classify as quoted "an investor visa".

The burden is upon a nonimmigrant who is seeking to enter the United States to establish that he falls within the classification of the particular nonimmigrant class that he is seeking to be admitted to the United States. Unless he can meet this burden he is classified as an immigrant. Clearly the applicants in this case, where they are seeking to enter the United States to stay indefinitely to take care of their business and remain permanently, brings them within the classification of an immigrant. They do not, of course, have an immigrant visa.

Counsel for the applicant urges that they be admitted to the United States so that they can reopen the previous deportation proceedings and pursue a theory of estoppel. The primary basis for the estoppel is that the American Consul or an officer in the Consulate in Iceland, induced the applicants to sell their property in Iceland and then make a substantial investment in the United States and ultimately become permanent residents. It is on the reliance of this advice that the respondents acted to their detriment. The position is more fully set forth in the attached memorandum and points of authorities (Exhibit 11). Counsel also urges that at the previous deportation hearing the applicants were not adequately represented by counsel, who should have raised this theory of estoppel. The applicants were also not advised of their right to appeal the deportation proceeding and the counsel feels that there has been quote "gross miscarriage of justice".

I can feel a sympathy for the applicants. They have

perhaps been mislead as to the difficulties of obtaining permanent residence in the United States, but the jurisdiction in an exclusion hearing is very limited. I cannot admit applicants who I find are clearly immigrants without the proper immigrant visas. I have no alternative but to order the applicants excluded and deported from the United States.

ORDER: IT IS ORDERED that the applicants be excluded and deported from the United States.

REECE B. ROBERTSON
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File A- 22 994 732
22 994 900
22 994 901

MATTER OF
Thorsteinn THORSTEINSSON)
Ragnheidur GUDRADSDOTTIR) In
Ragnhedur THORSTEINSSON) Exclusion
Applicants) Proceedings

TRANSCRIPT OF HEARING

Before: Reece B. Robertson, Immigration Judge

Date: May 14, 1981 Place: Tucson

Transcribed by Angie D. Alabado at Tucson

Official Interpreter: None

Language: English

APPEARANCES:

For the Service:
Jane Gersbacher, Esq.
Trial Attorney
Los Angeles, California

For the Respondent:
Elliot Glicksman & Mr. Messing, Esq.
Suite 1680, 33 North Stone
Tucson, Arizona 85701

IMMIGRATION JUDGE TO APPLICANTS:

Q. Do you speak and understand English?

A. Yes.

Q. I note that there is only two applicants here. It's my understanding, however, that the third applicant, Ragnheidur Thorsteinsson, is a child, is that right?

A. Yes.

Q. And she is your daughter, is that correct?

A. Yes.

Q. And so whatever order would apply to you will be applied to her too then I presume.

A. Yes.

JUDGE:

Alright, then I see no reason for her being present.

JUDGE TO MR. GLICKSMAN:

Q. Now, are you ready to proceed at this time, Mr. Glicksman?

A. Yes, we are, your Honor.

JUDGE TO APPLICANTS:

Q. Before we start, to both respondents, will you stand and raise your right hands to be sworn? Do you

solemnly swear, to both applicants, do you solemnly swear the testimony at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

A. Yes.

JUDGE TO MALE APPLICANT:

I have a notice on Form I-222. Counsel has stipulated that the male applicant receive the original of that notice. It will be entered in evidence as *Exhibit #1*.

JUDGE TO FEMALE APPLICANT:

I show you a notice on Form I-222, it is stipulated that the female respondent receive the original notice of that.

MR. GLICKSMAN:

Yes, your Honor. We stipulate that all of the respondents have received notice on the I-222 form.

JUDGE:

Alright, that will be received in evidence as *Exhibit #2* and the one relating to the child as *Exhibit #3*.

MR. GLICKSMAN:

After the receipt of those *Exhibits, 1,2,3,* as evidence, your Honor, may we address ourselves to that exhibit right at this moment because I think it has to do with that exhibit. I think the evidence will show that when Mr. and Mrs. Thorsteinsson and their daughter came back to the United States from the Republic of Mexico, after they had been there for approximately two and a half weeks, they

did have a valid visa for each of the applicants and it was in effect. Nobody had cancelled it and they have been given information to believe by their counsel and we will give an exhibit in evidence to show that they were authorized to come back from time to time to look after their business.

JUDGE TO MR. GLICKSMAN:

Well, Mr. Glicksman, you are getting a little ahead of me, I . . .

MR. GLICKSMAN:

I think it applies to the forms that you just received in evidence.

JUDGE TO MR. GLICKSMAN:

Q. Well the next question is, are the applicants applying to be admitted to the United States?

A. Yes, your Honor.

JUDGE TO MS. GERSBACHER:

Q. Now Ms. Gersbacher, is the government opposing the applicants admission into the United States?

A. Yes, your Honor.

Q. And now does the government file contain the documents that they applied for at the time they entered, or at the time they applied for admission?

A. The passport, your Honor, I have a copy. I believe the applicant has the original passport. I have a copy I can give you.

MS. GERSBACHER TO JUDGE:

Your Honor, I have a number of documents that I would like to request be amended into evidence. I've shown them all to counsel. The first are the I-94's of all three applicants.

JUDGE TO MR. GLICKSMAN:

Q. Any objection to that, counsel?

A. No, your Honor.

JUDGE:

I'll take that in evidence as *Exhibit #4.*

MS. GERSBACHER:

The next are copies of passport of the two adult applicants and the child is on the female applicants passport.

JUDGE TO MR. GLICKSMAN:

Q. Any objection to that, Counsel?

A. No, your Honor.

JUDGE:

I'll take that as a collective *Exhibit #5.*

MS. GERSBACHER:

The next is the record of the prior deportation hearing.

JUDGE TO MR. GLICKSMAN:

Q. Any objection to that?

A. Is that the transcript of the hearing?

JUDGE:

It is the I-39 and the transcript.

MR. GLICKSMAN:

No objection, you Honor.

JUDGE:

Take that in evidence as *Exhibit #6*.

MS. GERSBACHER:

The next is a letter from the prior attorney of the applicants requesting additional voluntary departure time after the deportation hearing.

JUDGE TO MR. GLICKSMAN:

Q. Any objection to that, counsel?

A. No, your Honor.

JUDGE:

I'll take that in evidence as *Exhibit #7*. Anything, Ms. Gersbacher?

MS. GERSBACHER:

Yes, the last are four requests for extensions of visitor status between the years 1978 and 1980.

JUDGE TO MR. GLICKSMAN:

Q. Any objection to that, Mr. Glicksman?

A. No, your Honor.

JUDGE:

I'll take that in evidence as a collective *Exhibit #8*.

MS. GERSBACHER:

Nothing further at this time regarding documents.

MR. GLICKSMAN:

Your Honor?

JUDGE:

Yes?

MR. GLICKSMAN:

I have a, one or two documents I'd like to offer into evidence. I've shown this to the trial attorney. It's the Form I-526 that Thorsteinn Thorsteinsson filed in Iceland before coming to the United States.

JUDGE TO MS. GERSBACHER:

Q. Any objection?

A. No, your Honor.

JUDGE:

I'll take into evidence as *Exhibit #9*.

MR. GLICKSMAN:

Lastly we had offered two letters into evidence, both of which were written by the Thorsteinsson's previous attorney, one to the applicants regarding their ability to reenter the United States following a voluntary departure and one to the American Consulate in Iceland regarding the status of their requests for permanent residence, permanent residents as an investor.

JUDGE TO MS. GERSBACHER:

Q. Any objection?

A. No objection, your Honor.

JUDGE:

I'll take the letters in evidence as collective *Exhibit #10.*

MR. GLICKSMAN:

If we could proceed now, your Honor?

JUDGE:

Yes.

MR. GLICKSMAN:

Before turning, the only charge against the Thorsteinsson's today is that they entered the country without a lawful unexpired visa. I think from the passport that has been admitted into evidence the court, the court will see that these passports were not cancelled until April 19, only a month ago at a hearing in Phoenix and at the time they did enter in March that these passports were still valid and unexpired, however, before turning to the merits of that charge, I would like the court to consider the memorandum of points and authorities that the court had an opportunity to glance at prior to going on the record. I've not filed it as a motion to reopen as such because of the fact that as the trial attorney pointed out, once someone voluntarily departs from the country a motion to reopen is no longer timely. However, I filed it based on the case law which

establishes that when there is gross miscarriage of justice or fundamental unfairness, that there can be a collateral attack on a previous deportation hearing. If the court believes that it's necessary to file it as a motion to reconsider, counsel and the applicants are prepared at this time to file the filing fee. The court inquired prior to going on the record as to what a competent attorney could have done to have kept them in the country at the deportation hearing and I believe competent counsel could have established through the testimony of the Thorsteinsson's and through the corroboration of documentary evidence that these people were told by Arnold Crowdy, the Vice Consul in Iceland, that they could obtain lawful permanent status, a green card, within fourteen months after coming to the United States, but that they'd have to return to Iceland to go pick it up. Based on this representation by the Vice Consulate the applicants sold all of their property, which they will testify they would not have done, or sold the bulk of their property in Iceland, which they would not have done. They came to the United States in 1977, prior to coming over in 1978, and purchased a business here in Tucson, which they would not have done, and further more, had it not been for the representations of the Vice Consulate over there, they would have, after coming here, they would have tried to obtain a labor certification and become an immigrant on that basis. After coming to the United States in 1978 they obtained three extensions on their visa, each time they explained the situation to the INS people here in Tucson and there is a notation on one of the applications for an extension where, I don't know if his name was Mr. McGehee

or McGeesh, I'm not sure what his name was, but whoever granted the extension made some notations that says quote "I really believe that the consul in Iceland gave these people bad advice." I think clearly there is an argument for estoppel and I've cited cases to the court where I think there is estoppel on several grounds. First, for estoppel you need affirmative misconduct by the government. There are cases, the Gustavo Case, which I've cited in my memorandum, which in that case an alien applied for a labor certification. At the time he applied there was already, he was on a list of pre-certified jobs. And after they found out that the, his representations were true they waited a year before making any decision. In that intervening period, the pre-certification list was changed by the labor department and suddenly because he was no longer certified, INS said, "I'm sorry, you can't stay". The ninth circuit, I believe it was the ninth circuit, said you cannot have an application like this and wait for a year, it's affirmative misconduct. You have a duty to inform them within a reasonable period of time that their application is denied. In this case the application was made in 1978 and the applicants have never heard, never heard, that their application was denied and in fact, one of the letters admitted into evidence is the letter of April 10 of a year ago from their previous attorney to the consul in Iceland saying to please let us know the status of this, and to this day they have never been advised that their application was denied. (Inaudible) the advice of the consul was wrong with the current status of visas, the advice he gave was wrong, but that's not the point. The point is that based on this inducement, they gave up everything and moved

their whole family out here. They invested their savings in a business out here, and for that reason they should not be forced to leave. In addition to the two-year period, (inaudible) affirmative misconduct which would support a finding of estoppel, the misrepresentation of Mr. Crowdy, the vice consul in Iceland, would further support a finding of estoppel.

JUDGE:

Well, it isn't a piece of evidence, but so that it will be identified, I will mark it as an exhibit and mark it as *Exhibit #11.*

MR. GLICKSMAN:

Thank you, your Honor. I think another reason that the deportation hearing was fundamentally unfair and should be reopened at this time is the fact that at a deportation hearing one has the right to effective assistance of counsel. I've cited cases in my memorandum, this is not based on a sixth amendment right to counsel, but on a fifth amendment, fundamental fairness and due process. In this case, the attorney Yetwin, despite knowing all the facts which I've just related to the court, never advised the Thorsteinsson's of the defense of estoppel and their ability to invoke this defense and the Thorsteinsson's will so testify. Furthermore, the Thorsteinsson's were misled when they admitted the charges on the Order to Show Cause at the deportation hearing and agreed to voluntarily depart. This court has an evidence from their attorney to them which states "You are entitled to return to the country and check on your business assets". In fact, the Thorsteinsson's will testify that

the day before they voluntarily departed the country they went to their attorney, Mr. Yetwin, showed him their visa and Mr. Yetwin said, "Yes, the visa is still valid. It has not been cancelled. You can return to the country". And this testimony by the Thorsteinsson's as I've said, will be corroborated by the letter, in evidence already, from Mr. Yetwin to them saying, "Yes, I've checked and I've received assurances that you can return." Furthermore, the attorney waived any right to appeal without discussing that with the applicants. For all of these reasons I think the previous proceedings were unfair in light of the equities of the situation, the fact that these people have given up so much and would not have done it had they known they could not stay here. I believe the deportation proceeding has to be reopen.

JUDGE TO MS. GERSBACHER:

Ms. Gersbacher:

MS. GERSBACHER:

Your Honor, the government's interpretation of the evidence is, of course, opposite of counsel. I don't believe the consul in Iceland told them that they could come here as a visitor and remain indefinitely and adjust. If he did, once they arrived in the United States, the evidence indicates that they were told otherwise. They applied for four extensions and the notations on the back indicated that they were told by the Service that they could not remain indefinitely. Also at the time they left Iceland, I don't know the exact date they established the priority date, but in 1978 the date was 1976 . . . When they came to the United States in 1978 as visitors, priority

date was 1976, which was before the date they had established a priority date and become completely unavailable in September 1978 and it's not been available since. And the letter from the attorney to the applicants indicates that they would have to come back to visit their business with a business visa, he doesn't say anything about coming back with a visitor/tourist visa. The other exhibit in there indicates that they knew they had to leave the country and which I think all this establishes the government's exclusion charge of 212(a)(20), at this time they were intending immigrants, intend to remain. They had asked for time, extension to sell their property, which is *exhibit #7*. So there has been, in this case, no miscarriage of justice.

JUDGE:

We're getting a little bit ahead of ourselves. We have a lot of evidence in the record, but up to this point we don't very much specify as to exactly what they are applying for at this time.

JUDGE TO MR. GLICKSMAN:

Q. Counsel, we haven't had them testify, but are they coming to the United States to reside indefinitely?

A. Your Honor, I would, the relief I'm asking for in this motion would be that the deportation hearing be reopened and that they be given the opportunity to establish their claim of estoppel. If indeed it is established, I don't thnk that they could be a finding of the court ability.

JUDGE:

Of course, I can't make a final deportability in an

exclusion hearing, all I can do is either admit or exclude them, now neither applicant has testified as to their purpose right now in coming to the United States.

MR. GLICKSMAN:

Your Honor, this court could grant the motion in which circumstance and all of the evidence and all of the statements I've made on the record will be supported by this testimony of the applicants. If the court would grant the motion, a deportation hearing could be ordered. Their intent has always been and their belief has always been that they would be allowed to remain in the United States as visitors. Had they known, had they known the status of investor visas, nonpreference visas, they would have done what Mrs. Thorsteinsson's brother-in-law has done. He also came over as an investor, but he obtained a labor certification and he is now a lawful permanent resident in Wisconsin. Had they known, had they been correctly advised by Mr. Crowdy, they would have done this as well and I'm confident they could have obtained labor certification. Under their present status, though, they can't even apply for it.

JUDGE:

Well, it would seem to me that they would have to be admitted to the United States to reopen their deportation proceedings, because technically they are not in the United States now.

MR. GLICKSMAN:

The only charge against them at this hearing, the

only charge, the only grounds for exclusion at this hearing, is that when they attempted to enter the United States they did not have a valid and unexpired visa. The fact of the matter is, as this court can see from the passports in evidence, when they tried to enter the United States they had a business visa and that visa said that they were entitled to stay quote "indefinitely". And that visa was only cancelled a month ago at the hearing in Phoenix, when either Mr. Martin or Mr. Lopez crossed it out with a pen and put the date under it. So I think that is the only charge against them at this time and I think they've established by preponderance of the evidence that they did not violate that law when they attempted to enter the country and I think that based on that alone, that they prevail in this hearing.

JUDGE TO MR. GLICKSMAN:

Q. Well, but is it stipulated that they are attempting to enter the United States to reside indefinitely at the present time, as of this moment?

A. As of this moment, I think they are only here to, under their visa as nonimmigrants, to check on their business, but while they're here I would tell the court that they will make efforts because of their reliance on statements made by them and because of the fact that they would not have come here, but for statements made to them by the consul in Iceland, that there will be efforts.

Q. Well, they will try to remain. Is that what you are saying?

A. They will try and reopen the deportation hearing and will try and remain and try and raise their estoppel defense.

Q. They still have their business in the United States?

A. Yes, they do.

Q. And they are attempting to return to take care of this business?

A. Whch they have invested over $40,000, well over $40,000, a quarter of a million? Their child is enrolled in a school here in the meantime. Your Honor, the only charge against them and I have the sheet of paper before me "you are notified that you are an immigrant at the time of application for admission not in possession of valid, unexpired immigrant visa", that is the charge against them and that charge is unfounded. They were in possession of one. They should be allowed to remain and they should be allowed to enter the country for six months as a nonimmigrant and during that time I think they should be allowed to move to reopen the deportation hearing and present their defense of estoppel and hopefully their reliance and their detrimental reliance on the allegations of Mr. Crowdy will not have harmed them too greatly.

Q. Well, then I take it counsel, if their deportation proceedings were reopened then they would apply for some type of relief to stay in the United States?

A. Yes, your Honor. They would claim that they are not deportable because they have a valid defense

of estoppel. The government is stopped from deporting them. They should at least, your Honor, is just seems that when they give up so much, when they move their whole family and they give up so much, they should at least have the chance to present their defense. Their attorney never even advised them of this defense, although he knows all the facts necessary. They should at least have the chance to have their day in court. You've got the transcript of the deportation hearing, it's six pages, they admit everything and their attorney waives their right to appeal anything, and they've never been advised of this. These people don't know Immigration Law. They're relying on Mr. Yetwin and they have a right to counsel at this deportation hearing, effective counsel. Certainly they should be entitled to their day in court, Judge.

JUDGE:

Well, of course, in the exclusion hearing my jurisdiction is limited.

MR. GLICKSMAN:

I understand that.

JUDGE:

Well, is there anymore evidence that either side wants to present at this time as to the exclusion charge?

MR. GLICKSMAN:

Well, your Honor . . .

JUDGE:

I mean you've made mostly argument, I guess that's alright, well, your speaking on behalf of the applicant, so, do you want to question them or submit any evidence?

MR. GLICKSMAN:

Yes, your Honor. This has been our argument of counsel thus far. I'd like to present on two things. counsel thus far. I'd like to present evidence on two things. I'd like to present the testimony of the applicants, both on the fact that they had a valid, unexpired visa when they attempted to enter the country.

JUDGE:

You have the documents in evidence, counsel, so I can interpret for myself what the nature of the documents are.

JUDGE TO MR. GLICKSMAN:

Q. Now, did you want to call either one for testimony at this time?

A. Well, I would also like to call them for testimony into the vows I've made to the court as to the facts on this motion to reopen, unless the trial attorney will stipulate that that's what their testimony will be. I will accept my (inaudible). I'd like to call them and have them testify to the things I've stated to the court.

JUDGE:

Alright, why don't you call one of the applicants.

MR. GLICKSMAN TO JUDGE:

With the court's permission, could Mr. Messing handle the questioning of her?

JUDGE:

Yes, that's perfectly alright.

MR. GLICKSMAN:

Thank you, your Honor.

MR. MESSING TO FEMALE APPLICANT:

Q. Mrs. Thorsteinsson, you've been sworn to tell the truth, the whole truth, and your going to tell the truth, right?

A. Yes.

Q. Give us your name, tell us where you live.

A. My name is Ragnheidur Gudradsdottir and I live on 1215 Painted Hill.

Q. And that's in Tucson?

A. Yes.

Q. And how long have you lived there?

A. Three years almost.

Q. Do you recall when you were living in Iceland when you first started to think about coming to the United States, do you recall everything that happened?

A. Can I?

Q. Do you recall? Do you remember?

A. Yes.

Q. Okay. When was the first time you went to do anything about coming to the United States? Give us a date, about when was that?

A. To move over or to come into the United States for the first time?

Q. For the first time!

A. Was 1973. Then we came over to United States just to travel.

Q. And at that time you had a tourist visa?

A. Yes.

Q. And how long did you stay in the United States?

A. About six weeks.

Q. And at the end of the six weeks, where did you go?

A. To Iceland.

Q. And as a result of that travel as a tourist did you make any decision as to whether you wanted to immigrate to the United States?

A. Next time we came to United States in 1976 to travel too, then we stayed for six weeks. Then we (inaudible) and we talked to the Iceland American Embassy about we have interest in moving to the United States.

Q. What was the name of that fellow, do you remember? What was the name of the consul or other person you spoke to in Iceland?

A. The first time I don't remember because they are many people there, and was one coming and one going, but he told us, showed us what we would have to fill out and what to do before we could move over here. He told us that we would have to invest or that would be the easiest thing to do to be able to move into the United States, that we would have to do that before we filled out those applications.

Q. Did he tell you any other way that you could somehow . . .?

A. Or we could apply for a , b in United States and that would have been easy because we have the family in Los Angeles, that would have been easy, but we have the money and we wanted to work all by ourselves and have our own business.

Q. Did they tell you how much you had to invest?

A. I think it was $10,000, $20,000. It was ten then.

Q. And did you fill out the application?

A. (Inaudible) and what is business, came back again . . .

Q. What business was he buying?

A. The KOA Campground. Campground of America.

Q. And where is that?

A. 955 Casa Grande Highway.

Q. Is that in Tucson?

A. Yes.

Q. And when did you buy that?

A. We bought that in 1977.

Q. And how much did you pay for that, the full price?

A. The full price was $500, I can't remember, $550. . . .

Q. About $550,000?

A. Yes.

Q. And how much cash did you put down?

A. $420, something about that.

Q. $420,000 dollars?

A. Yes, when we have paid the first payment, we paid for everything. That was in 1978, after we came over.

Q. Let's go one at a time. How much did you put down to buy the business and then leave to go back to Iceland?

A. $25,000.

Q. And then you went back to Iceland?

A. Yes.

JUDGE TO FEMALE APPLICANT:

Q. Was it $20,000 or $120,000?

A. $25,000 that we put down in 1977 when we made the deal about buying the campground.

Q. How much was the total price? Was it $550,000?

A. $550,000.

Q. That's a half a million dollars?

A. Yes, the whole price for it.

Q. Alright.

MR. MESSING TO FEMALE APPLICANT:

Q. Then you went back to Iceland?

A. Yeah.

Q. Did you go then to the consul again?

A. Oh, yes. (inaudible).

Q. Did you tell him how much you invested?

A. Oh, he had down everything we showed to him. We wrote it on application and we told him that we wanted to move to the United States and sold our house and some of our furnture.

Q. Can I have *Exhibit #9*, your Honor? I'm going to

show you *Exhibit #9* and ask you to look at that. Do you know what that is? I'm handing you *Exhibit #9*, is that what you filled out when you were in the Vice Consul?

A. Yes.

Q. And does that show how much you had put down?

A. Yes.

Q. Okay. Now, when you went to the Vice Consul and filled out this application, you were told to come into Iceland and register and to get an investor's visa, is that correct?

A. Oh, yes.

Q. What did the vice consul tell you?

A. He told us that it would be twelve to fourteen months to get the numbers so we would be American citizens, or whatever we were applying for, so we won't be able to stay here, it would take twelve to fourteen months. We knew that we were going to be able to get six months when we came into the country. He said that would be no problem, we could just get extension and then the number would be up because it has never taken more time than that.

Q. Did you ask him whether you should sell most of your holdings in Iceland, that it was sure that you were gonna get that?

A. We told him that we were going to go and going to take our furniture and what we have with us, some

of it, and then we were going to ship the rest over. We took it to a big container in back of the ship. He said no problem.

Q. Okay. And if you had known that you would not be able to get an investor's visa would have done that, sold your property?

A. Never. I would never again go through all that.

Q. Okay. And then you came here on a six-month tourist visa for yourself and what kind of visa did your husband have?

A. He has a business visa, like this, another kind of visa that the American Embassy gave to him.

Q. Okay. And after the six months were up what did you do?

A. We came to the Immigration and ask for extension, because in our heart we thought that that would be the only one we needed.

Q. Did you have a lawyer at that time?

A. No.

Q. And were you able to get an extension?

A. Yes.

Q. And when you got an extension did you talk to the Officer in Charge?

A. Yes.

Q. Have you made another investment in any land that you've bought in Tucson?

A. Oh, yes.

Q. And how much did you buy that piece of land for?

A. I can't think now.

Q. Okay, we'll ask your husband about that.

A. Okay.

Q. And do you want to stay here?

A. Oh yes.

Q. When, the day before you left to go to Mexico after the hearing at which you were present but didn't testify, did you have a conversation with your lawyer about leaving and coming back?

A. Yes.

Q. Had you had conversations with him before that about leaving and being able to come back?

A. He told us, yes. He told us that we would have to leave and come back. There was nothing else we could do. But I didn't know because everything was in his hand. He said, "Really, you wll be back again, don't worry".

Q. Did he tell you anything about the visa not being good anymore if were going to go back?

A. No, he told us, we knew the visa was good. He knew the visa was in there and it was good.

Q. And did he tell you that that was good?

A. Yes. Else we wouldn't be able to come to United States agan.

Q. Did he ever tell you that you had a right to oppose the departure and that you had a right to appeal if the departure was not granted if (inaudible)?

A. No, I didn't know anything. Everything was in his hands, I didn't know.

Q. Did he ever tell you that you had a right to appeal, but you could waive the appeal and he was going to waive the appeal?

A. Never, never.

Q. (Inaudble). When you spoke to Yetwin about the fact that your extension had been denied, is that when you first went to Yetwin, when your last extension was denied by Mr. Lopez?

A. Yes.

Q. And did you explain to Yetwin what the consul in Iceland had told you?

A. Oh yes, we told him everything.

Q. And did you explain to him that if they hadn't told you that you could have gotten a green card (inaudible), anytime you like?

A. Oh yes.

Q. Did you explain to him that if they had not told you

that you could get the visa in fourteen to sixteen months, you would not have sold all your furniture and not sold most of your property and bring your furniture over here, did you tell him all that?

A. Yes.

Q. Did he ever discuss with you the fact that you had a defense to being deported on the grounds of estoppel?

A. No.

Q. And (inaudible) did he ever tell you that you've been invited to somebody's house and then when you come into the house they tell you to get out? Did he ever discuss any of that with you?

A. No.

Q. When you went to Mr. Lopez's predecessor, the fellow who was here before, I think his name was McGehee or something like that, did you tell him why you wanted the extension and what you were waiting for?

A. Yes.

Q. What did you tell him?

A. We told him exactly why we needed the extension and that hopefully we would only need this one because we were waiting for our number.

Q. And your number was on the visitor's visa?

A. We are waiting for our number, for investment,

that's what the number of what I'm talking about and that's the number that should come up.

Q. Did the vice consul before you left and when he said no problem, did he at that time give you an expectation that there was nothing to worry about, that your going to get that investment visa?

A. Of course, else we wouldn't have done this. We would never have sold everything and move over everything over here and bought a home and made a home here, have a home for more than three years now. I mean that's our only hope.

Q. I have no further questions. Oh, yes, one more. Did you ever tell the fellow at the Immigration Service when you were asking for an extension that you had left a furnished house in Iceland, that you could go back to?

A. No, that we have never done because we sold our house, what was left of our furniture that we didn't want to take with us.

MR. MESSING TO JUDGE:

I have no further questions, your Honor.

JUDGE TO MS. GERSBACHER:

Ms. Gersbacher?

MS. GERSBACHER TO FEMALE APPLICANT:

Q. According to *Exhibit* #9 your priority date, or the date you filed the application, with the consul in Iceland, would be February 3, 1978. And then according to the Order to Show Cause you would have,

is it correct after you filed the application you then entered the United States four days later? As a visitor in 1978?

A. Yes.

Q. When your priority date became available, did you intend to go back to Iceland? And get your permanent resident visa or did you intend to stay in the United States and get it?

A. In Iceland (inaudible) they asked us for our address here so they could notice us when our number would be up and we will go to Iceland and get the papers. The embassy was going to let us know when everything was ready and we would go to Iceland and pick it up.

Q. What exactly, when you filed for the priority date, in other words filed the application as an investor, did you go yourselves and talk to the consul?

A. (Inaudible).

JUDGE:

I didn't hear it.

FEMALE APPLICANT:

We went, both of us, to the American Embassy.

MS. GERSBACHER TO FEMALE APPLICANT:

Q. At that time did he tell you how long you had to wait before your number became available?

A. It could be twelve to fourteen months.

Q. Did you already then have your B-2 visitors visa to come to the United States?

A. That is one thing now I can't remember, it's this, yes, that's the same visa I got 1973 when we were over here for the first time. Because that visa was . . .

Q. So did you even tell the consul that you, well did you even talk to the consul or any officer there? Or did you just submit the papers?

MR. MESSING TO MS. GERSBACHER:

Q. At what time?

A. In February 1978.

MR. MESSING TO FEMALE APPLICANT:

Q. Do you understand the question?

A. Yes, I understand, just trying to remember whom I talk the last day or days before we came. I talked to the man that filled out, we talked to a man when he filled out our papers, Crowdy, I can't pronounce it.

MS. GERSBACHER TO FEMALE APPLICANT:

Q. Was he with the State Department or is he a private individual that you employed?

A. No, are you talking about the man in the American Embassy in Iceland, Yes, we talked to him.

Q. But he didn't fill out all your papers did he, for the application? I think the question was did you

talk to a employee of the American Consul in Iceland when you submitted this application?

A. We talked to Crowdy.

Q. Can you remember any of the conversation in February 1978?

A. Can I remember, I remember, I remember it is just that we were so quite sure that this would be okay. He told us that it would be ten, twelve to fourteen months, that number would come back, to send him our address in the United States so he could let us know when everything was ready. They knew that we were going to take our family to America with us, they knew we were moving.

Q. After you arrived in the United States you were informed by the, were you informed by the Immigration Service that you could not remain longer? That the advice apparently that the consul had given you was incorrect?

A. After the first six months?

Q. Yes, after you applied, when you first applied for an extension.

A. Yes, after. When our six months were up we came here to the office and talked to the man and told him why we needed the extension, because we were waiting for that number and like we said before this would be the only time we would have to go because that number would be up.

Q. Well, did you ask for an extension so you could find a manager to manage the business?

A. No, we have a manager there.

Q. Were you told that you had to leave the United States, that you couldn't stay longer?

MR. MESSING TO MS. GERSBACHER:

Q. This is the first time that we're talking about, just for foundation?

A. Yes, the first one. Were you told that you could not stay as a visitor and manage the business?

FEMALE APPLICANT:

A. Yes, but we told the man that why we were waiting. So we were really worried about it, we told him why we needed the extension because we were waiting for our number to come up.

MS. GERSBACHER TO FEMALE APPLICANT:

Q. You were given another six months extension?

A. Yes.

Q. Okay, and then you applied for another six months extension?

A. Yes.

Q. And what was the reason this time?

A. Because, just the number wasn't up (inaudible) that this number we had been waiting everyday for that number to come. It was just a matter of time.

Q. Well, did the Immigration Service at any time tell

you that you had to leave the United States, you could not remain indefinitely?

A. That is what we knew, that after six months we would have to get another extension.

Q. On one of them did they give you time to sell your business?

A. Yes. That was not until after we got the notice that we were denied to be here.

Q. And did you attempt to sell your business?

A. Oh, yes, (inaudible) just not sold it yet. We have in the past, we have advertised it.

Q. When you left the United States in 1981 did you attempt, you just went to Mexico, did you intend to return immediately to the United States?

A. Oh yes, we did. Because we thought after the lawyer told us that this was just it didn't matter where we go we just have to leave and come back again. If we left United States and coming back again (inaudible).

Q. You own a home here?

A. Yes.

Q. Do you still own a home?

A. Oh yes.

Q. Let's see, you came in March, is your daughter in school?

A. Yes.

Q. Was she in school before you left?

A. Yes.

Q. And did she return to the same school when you came back?

A. Yes.

Q. Do you have any plans to go back to Iceland or to leave the United States?

A. No.

Q. You intend to remain here indefinitely?

A. If possible.

Q. If the judge would admit you now, how long would you plan to stay? You don't really intend to leave right now if your admitted to the United States.

MR. MESSING:

Well, let me object to that. It's argumentative for one reason and for the second reason she's relying out of advice of counsel in trying to reopen the deportation hearing.

MS. GERSBACHER:

I'll withdraw anyway because she already said she didn't intend to leave.

MR. MESSING:

I would object to move that that be stripped.

MS. GERSBACHER TO JUDGE:

Nothing further, your Honor.

MR. MESSING TO JUDGE:

I would question Mr. Thorsteinsson now.

JUDGE TO MR. MESSING:

Alright, proceed.

MR. MESSING TO MALE APPLICANT:

Q. Your name is?

A. Thorsteinn Laufkvist Thorsteinsson.

MR. MESSING:

Speak up a little.

A. Thorsteinn Laufkvist Thorsteinsson.

Q. And you've heard the testimony that your wife gave while you were here, is what she said true and correct as far as you recall?

A. Yes, but I cannot (inaudible).

MR. MESSING:

Okay, I'm going to ask you a few more questions.

MALE APPLICANT TO MR. MESSING:

We left in Iceland about ten percent of home there, and that is a small flat (inaudible), but we rent it out and I own a business there.

A. Yes, I bought the land around by the campground.

Q. And how much did you pay for that?

A. That one I paid $26,000.

Q. And how much did you put down?

A. I think $7,000.

Q. Do you own any vehicles . . . ?

A. No, I bought another property.

Q. What's the other property?

A. On Cortaro Farm Road.

Q. And how much did you pay for that?

A. $45,000.

Q. And how much did you put down?

A. $9,000, something like that.

Q. Are you making payments on all these properties?

A. Yes, yes.

Q. Okay, now, do you have any vehicles?

A. I bought so many vehicles here I'm not going to talk about that. They change so often.

Q. Okay.

A. But I have now a Ford Pick-up '78, 35' travel trailer use that for pulling, then we got a new Chrysler New Yorker, a new one, then I got Imperial.

Q. And about how much money did you invest in these vehicles?

A. I have four cars.

Q. Let me ask you this question, were you ever notified before you went to see a lawyer, by anybody, that the United States was not giving anymore investor visas?

A. I don't really understand how I shall answer. You know, not give no investor visa, no give it out no more. I have heard about it, no, I heard it from the lawyer.

Q. (inaudible).

A. No, no.

Q. If you had been told that you were not gonna get any investor visa to remain in the United States, would you have sold out everything and bought all this stuff here?

A. No, of course not.

Q. When you came back to the United States from Mexico did you have a valid visa, that you thought was valid?

A. Oh yes, it was valid.

Q. Did anybody tell you that you would have to turn that visa in when you left the country to go to Mexico?

A. No, it should not be, never be turned in.

Q. But did anybody tell you that you'd have to turn it in?

A. No.

Q. Did Mr. Lopez ever tell you that?

A. No. He didn't talk even to me.

Q. He never talked to you?

A. He never talked to me. He just do the things, you know, without talking which is not right. You were (inaudible) when he took visa out, the passport and didn't say a word, which is not right.

Q. Did you, when you came back from Mexico, believe that you couldn't come back?

A. I had never been gone.

Q. And when you talked to your lawyer, Mr. Yetwin, about going to Mexico . . .?

A. What did he say to you?

A. He said, "Good news or bad news?" when I came in and I said I didn't know, I was leaving tomorrow as you asked me to do. And that's good news he told me, let me see your passport (inaudible).

Q. Did you tell him how long you were gonna go to Mexico for?

A. I said half a month, three weeks.

Q. And then you were gonna come back?

A. Yes.

Q. And did you tell him that?

A. Yes.

Q. And what did he tell you?

A. He said everything is okay, it's good visa.

Q. I'd like to clear up one more thing, Thorst, if you knew that Mr. Crowdy was wrong and that you could not get an investor visa, would you have done something else to try to come into the country on a different visa?

A. I am so different on this, I am so different about this you know for I have a family in LA. I could get on a labor certificate for the green card you know. But it found this is the easier way in and it was told easiest way. It was no problem even when I came first to him, then it was only $10,000 invest, but then in time I talked to hm again and they have a new form like this and then it's $40,000 you have to invest.

MR. MESSING TO JUDGE:

I have nothing further Judge.

JUDGE TO MS. GERSBACHER:

Ms. Gersbacher?

MS. GERSBACHER TO MALE APPLICANT:

Q. What family do you have in LA?

A. There are two sisters from my (inaudible).

Q. Are they citizens or . . . ?

A. One is citizen, one has never been citizen. But they came here together in 1950. And one of them has two girl that they are married here in LA.

Q. Do you have any other family or father, mother, sisters?

A. No, no. This is all my family. I'm alone you know, I'm the only kid, you know. It's my father's family is all here.

Q. Oh, these aren't half sisters?

A. No.

MR. GLICKSMAN TO MS. GERSBACHER:
Aunt.

MS. GERSBACHER:
Oh, aunt.

MR. MESSING:
Two aunts.

MALE APPLICANT:
But I mean my father's family is all here.

MS. GERSBACHER TO MALE APPLICANT:

Q. And what s your profession?

A. Me? A business.

MS. GERSBACHER TO JUDGE:
Nothing further, your Honor.

JUDGE:

Recess declared.

JUDGE:

Hearing resumed, same persons present. Anymore evidence counsel?

MR. GLICKSMAN:

I don't believe so, your Honor, I think we rest at this time.

JUDGE TO MS. GERSBACHER:

Q. Ms. Gersbacher?

A. Just one question to the male applicant.

MS. GERSBACHER TO MALE APPLICANT:

Q. What is your present intent now when you are applying for admission to the United States?

MR. GLICKSMAN:

Your Honor, we object. I think that all depends on if we are allowed to reopen the deportation hearing, depend on if the court excludes them now. What is his intent really has only to do with what's going to happen in the future, it's all to this point. If the court finds he's not excludable, he's allowed to present a case at the deportation hearing, he certainly would like to stay, we all know that, that's why we're here.

JUDGE:

Well, the objection is overruled. He is applying for admission, his intent is material.

MALE APPLICANT:

A. To stay on here.

JUDGE TO MALE APPLICANT:

Q. To what?

A. To stay on here so I can take care of my business and my home. (Inaudible).

MS. GERSBACHER TO MALE APPLICANT:

Q. Do you have any definite date when you might plan to leave the United States?

MR. MESSING:

I'm going to answer that because he's going to do what his counsel tells him to do. He's represented by counsel, we're giving him advice and . . .

JUDGE:

Objection overruled.

MR. GLICKSMAN TO MALE APPLICANT:

You have to answer to that.

MALE APPLICANT:

About . . .

MS. GERSBACHER TO MALE APPLICANT:

Q. Do you have any definite plans when you . . .?

A. Only to stay here and invest my money.

Q. No, when you intend, do you have a definite date in mind when you plan to leave the United States?

A. No, I haven't planned to leave.

MS. GERSBACHER:
I have nothing further.

MR. MESSING TO MALE APPLICANT:

Q. If the judge says you can come for thirty days and if nothing happens in the way of reopening the other hearing that you had with Mr. Yetwin, will you leave at the end of the six months? Unless you can get an extension?

A. Yeah, I will try for another extension.

Q. And if they don't give it to you, will you then leave?

A. Yeah. I would not like to leave if I have no choice, my business and I got my home here for almost . . .

Q. But if you didn't have a choice, you would leave, correct?

A. Yes.

JUDGE TO MALE APPLICANT:

Q. How old are you now?

A. 48.

Q. 48?

A. Yeah.

JUDGE TO FEMALE APPLICANT:

Q. And how old are you?

A. 48.

JUDGE TO MR. GLICKSMAN:

Q. Anything further, Mr. Glicksman?

A. No, your Honor.

JUDGE TO MS. GERSBACHER:

Q. Ms. Gersbacher?

A. Nothing further.

MR. GLICKSMAN TO JUDGE:

Except, your Honor, I would again reiterate that if the court believes that the memorandum should be considered as a motion to reopen that we are prepared to file the filing fee.

JUDGE:

Well, we'll require to file a fee on it and Ill leave it in the record as it is.

(NOTE: Oral decision has been transcribed separately and is found in the Record of Proceeding.)

JUDGE TO MR. GLICKSMAN:

Q. Mr. Glicksman, do the applicants wish to take an appeal?

A. Yes, Your Honor.

JUDGE TO MR. GLICKSMAN:

Now under the regulations and the law you have to take the appeal here and now.

MR. GLICKSMAN TO JUDGE:

Yes, your Honor.

JUDGE:

Hearing closed.

HEARING CLOSED

I hereby certify that to the best of my knowledge and belief the foregoing pages 1 thru 39 are a true and accurate transcript of the hearing herein.
June 15, 1981

/s/ ANGIE ALABADO

No. 83-1495

In the Supreme Court of the United States

OCTOBER TERM, 1983

THORSTEINN LAUFKVIST THORSTEINSSON, ET AL.,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction to consider petitioners' claim that their deportation hearing should be reopened because their counsel failed to raise an affirmative defense of equitable estoppel at that hearing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-25) is reported at 724 F.2d 1365. The opinion of the Board of Immigration Appeals (Pet. App. 26-34) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1984. A petition for rehearing was denied on February 6, 1984. The petition for a writ of certiorari was filed on March 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, who are husband and wife and their daughter, are natives and citizens of Iceland. The husband initially entered the United States on February 7, 1978, as a

nonimmigrant visitor for business purposes. His wife and daughter entered the United States on the same date as nonimmigrant visitors for pleasure. See Section 101(a)(15)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(B). Following their admission and several extensions of stay, petitioners were authorized to remain in the United States until February 6, 1980. Pet. App. 37.

In March 1980, the Immigration and Naturalization Service (INS) denied petitioners' application for a further extension of stay and informed them that they were required to leave the United States no later than April 15, 1980. See Pet. App. 20. Petitioners did not leave by that date, and on May 19, 1980, the INS issued an Order to Show Cause and Notice of Hearing. The Order to Show Cause charged that petitioners were subject to deportation pursuant to Section 241(a)(2) of the Act, 8 U.S.C. 1251(a)(2), because they had been admitted as nonimmigrants under 8 U.S.C. 1101(a)(15) for a specified time and had remained in the United States for a longer time than permitted.

Petitioners' deportation hearing was held on August 25, 1980. Petitioners appeared with counsel, admitted the truth of the factual allegations, and conceded deportability. However, counsel for petitioners advised the immigration judge that he and the INS had entered into a stipulation that petitioners would be granted nine months within which to depart voluntarily from the United States. The immigration judge found petitioners deportable and granted them nine months within which to depart voluntarily or be deported. Petitioners did not appeal from this decision. On December 31, 1980, the INS granted petitioners' application for extension of their voluntary departure date to March 5, 1981. Petitioners left the United States on March 3, 1981. Pet. App. 20-21, 37.

2. On March 18, 1981, petitioners applied for admission to the United States as nonimmigrant visitors, pursuant to 8 U.S.C. 1101(a)(15)(B), at El Paso, Texas. They were paroled into the United States for completion of inspection and review of their previous file. On March 27, 1981, the INS began exclusion proceedings against petitioners. An exclusion hearing was held on May 14, 1981. Pet. App. 27. Petitioners appeared with new counsel and contended that the INS should reopen their prior deportation proceeding on the ground that their former counsel never asserted a defense based on the doctrine of equitable estoppel. Petitioners testified at the exclusion hearing that a vice consul at the United States Embassy in Iceland had advised them that they would be able to obtain immigrant visas within 12 to 14 months if they invested in American business and that, in reliance on that advice, they had invested substantial sums in an Arizona business. Pet. App. 59-84. The immigration judge stated that petitioners were technically outside of the United States and that they would have to be admitted before the INS could reopen their deportation proceeding. In an oral decision, the judge held that he could not admit petitioners because they were clearly immigrants without valid immigrant visas. The judge ordered petitioners excluded and deported from the United States. Pet. App. 35-39.

Petitioners sought review by the Board of Immigration Appeals, which dismissed their appeal (Pet. App. 26-34). The Board found that petitioners were clearly excludable under Section 212(a)(20) of the Act, 8 U.S.C. 1182(a)(20). Without reaching the question whether an alien applicant for admission to the United States may attack a deportation order in subsequent exclusion proceedings, the Board found there had been no gross miscarriage of justice that might justify reopening petitioners' deportation proceeding. The Board concluded that the doctrine of equitable estoppel did not support petitioners' claim and that their

counsel's failure to raise that defense therefore did not constitute ineffective assistance of counsel. Pet. App. 32-33.

3. Petitioners filed a petition for writ of habeas corpus in the United States District Court for the District of Arizona, pursuant to Section 106(b) of the Act, 8 U.S.C. 1105a(b). The district court dismissed the petition for lack of jurisdiction, based on its conclusion that petitioners' real purpose was to obtain reopening of the deportation proceeding. Pet. App. 21.

4. Petitioners then filed a petition for review of the Board's denial of their request to reopen the deportation proceeding. The court of appeals dismissed the petition (Pet. App. 19-25). The court held that under 8 U.S.C. 1105a(c) it lacked jurisdiction since petitioners had failed to exhaust their administrative remedies through an appeal of the deportation order and since they had left the United States following the deportation order. The court rejected petitioners' contention that they nevertheless should be allowed to seek judicial review because their first counsel's failure to raise the defense of equitable estoppel deprived them of their right to due process. The court concluded that petitioners' counsel had made a "tactical decision" not to raise the doctrine of equitable estoppel and that such a decision did not constitute ineffective assistance of counsel. The court of appeals noted that "[b]y entering into a stipulation with the INS instead of contesting [petitioners'] deportability, the attorney was able to secure an extended period during which [petitioners] could liquidate their assets in an orderly fashion and still voluntarily leave the country" (Pet. App. 24).

ARGUMENT

The court of appeals correctly concluded that it lacked jurisdiction to hear petitioners' claim that their deportation hearing should be reopened (Pet. App. 24-25). That conclusion does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Section 106(c) of the Immigration and Nationality Act, 8 U.S.C. 1105a(c), provides that a deportation order "shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order."[1] Here petitioners failed to exhaust their administrative remedies, since they did not appeal the deportation order. Moreover, petitioners left the United States after the deportation order was issued. Thus, as the court of appeals noted (Pet. App. 22), the plain language of 8 U.S.C. 1105a(c) appears to bar judicial review in this case.

2. Petitioners contend (Pet. 8-16) that due process principles nevertheless require reopening of their deportation hearing. They point first (*id.* at 8-13) to their attorney's failure to consult with them concerning whether the defense of equitable estoppel should be raised and second (*id.* at 13-16) to the attorney's failure to raise that defense at the deportation hearing. Assuming arguendo that such a claim may be raised in a subsequent exclusion proceeding,[2] petitioners' contention is without merit.

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[1]In addition, under 8 C.F.R. 3.2, immigration judges and the Board of Immigration Appeals may not consider a motion to reopen deportation proceedings after an alien has departed from the United States.

[2]The Board of Immigration Appeals assumed without deciding (Pet. App. 30) that an alien applicant for admission to the United States could attack a deportation order in subsequent exclusion proceedings in cases involving a gross miscarriage of justice in the deportation proceedings. The Board found no such miscarriage of justice in this case.

We note initially that in the court of appeals petitioners did not claim that the attorney's failure to consult with them constituted a due process violation; rather, they focused solely on the attorney's failure to raise the defense. Neither the court of appeals, the Board of Immigration Appeals, nor the immigration judge addressed the question of the failure to consult. Consideration of such a claim is ordinarily inappropriate. See *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

a. To the extent a right to counsel exists in connection with deportation hearings, it is grounded in the Fifth Amendment and in Section 242(b)(2) of the Act, 8 U.S.C. 1252(b)(2), which provides that INS regulations must require that "the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."[3] Any such right was satisfied here. Petitioners were permitted to retain counsel of their choice; they do not suggest that their attorney was not authorized to practice in deportation proceedings.

The adequacy of performance of petitioners' attorney does not implicate due process concerns. This Court has held that even a court-appointed attorney whose salary is paid by the state does not act "under color of state law" when performing a lawyer's traditional functions in a state criminal proceeding. *Polk County* v. *Dodson*, 454 U.S. 312, 317-325 (1981). A fortiori, the conduct of petitioners' privately retained counsel in advising them and presenting their case during the deportation proceeding would not

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[3]The Sixth Amendment right to counsel is inapplicable, since deportation proceedings are civil in nature. See *Ramirez* v. *INS*, 550 F.2d 560, 563 (9th Cir. 1977); *Barthold* v. *INS*, 517 F.2d 689, 690-691 (5th Cir. 1975).

constitute governmental action for purposes of the Due Process Clause. See *Wainwright* v. *Torna*, 455 U.S. 586, 588 n.4 (1982). If an attorney acts negligently in the course of such a proceeding, he might be subject to a charge of malpractice. Such negligence, however, would not, as a constitutional matter, require reopening of a civil agency proceeding (at least if it had not undermined the fundamental fairness of the proceeding). See *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962). The Constitution obviously does not require that civil judgments in favor of the United States be subject to collateral attack on grounds of inadequacy of representation by privately retained opposing counsel.

b. In any event, the record in this case does not even suggest that petitioners' attorney performed inadequately. Petitioners do not complain of his performance except with respect to the estoppel defense. But petitioners' attorney surely was not required to consult with them about each and every decision that arose during the deportation proceedings. Cf. *Jones* v. *Barnes*, No. 81-1794 (July 5, 1983); *Wainwright* v. *Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring). In particular, counsel was not required to consult with petitioners about a potential equitable estoppel defense that was of dubious merit in the circumstances of this case. See pages 8-9, *infra*.

Petitioners did not offer any evidence concerning the reason their counsel failed to raise the defense. However, as the court of appeals noted (Pet. App. 23-24), the decision not to raise an affirmative defense appears to have been a tactical choice from which petitioners benefited. The usual period for voluntary departure is 30 days. See 8 C.F.R. 242.5(a)(3). By not contesting deportability, petitioners' attorney was able to persuade the INS to allow petitioners nine months within which to depart voluntarily from the

United States. Thus, petitioners gained a significant amount of extra time in which they could liquidate their assets in an orderly way.

Moreover, petitioners' equitable estoppel defense clearly lacks merit. This Court has consistently held that the federal government may not be equitably estopped, at least in the absence of serious affirmative misconduct. See, *e.g.*, *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961). Cf. *Heckler* v. *Community Health Services of Crawford County, Inc.*, No. 83-56 (argued Feb. 27, 1984). The Board of Immigration Appeals properly concluded (Pet. App. 30-32) that the facts of this case do not show any such affirmative misconduct.

Petitioners contend (Pet. 5-6) that they relied on oral advice of a consul of the United States Embassy in Iceland that they would have no problem obtaining immigrant visas within 12 to 14 months if they invested in American business and that they could obtain extensions of their nonimmigrant visas until the completion of processing of immigrant visas. The Board of Immigration Appeals concluded (Pet. App. 31), however, that it was more likely that petitioners simply misunderstood the consul's comments regarding the nonpreference investor process and his expectation concerning petitioners' priority date. The Board also noted (*ibid.*) that the consul could not be expected to foresee that nonpreference visa numbers would subsequently become unavailable. Even if the consul did render erroneous advice, that would not be sufficient grounds for estopping the INS from performing its statutory duty to enforce the immigration laws. This Court has held that erroneous advice by a government agent does not constitute the sort of affirmative misconduct that would warrant estoppel of the government. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. at 790

(quoting *Montana* v. *Kennedy*, 366 U.S. at 314); *FCIC* v. *Merrill*, 332 U.S. 380 (1947).

Petitioners also contend (Pet. 15-16) that the INS should have been estopped from deporting them because it extended their stay as nonimmigrants on several occasions. Petitioners claim that each time they sought an extension they advised INS personnel that they needed the extension because they were waiting for immigrant visas. However, the Board found (Pet. App. 32) that petitioners assured the INS that they still owned a home in Iceland, that they intended to return to Iceland, and that they would obtain any immigrant visas there.[4] Thus, it appears that petitioners fully understood that the extensions of stay did not entitle them to permanent resident status. In any event, even if INS officials were aware of petitioners' desire to immigrate at the time they considered the requests for extensions of stay, any generosity in granting the extensions surely did not preclude the INS from subsequently taking the position that petitioners could not re-enter the United States with nonimmigrant visas.[5]

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[4]In addition, the administrative record (at 167-171) shows that each time petitioners requested an extension they stated that the request was for "business reasons."

[5]Petitioners' claim that they were denied "any opportunity" (Pet. 13) to present their estoppel defense is incorrect. Petitioners presented testimony relevant to that defense at their exclusion hearing (see Pet. App. 59-84). The Board of Immigration Appeals addressed petitioners' estoppel argument and squarely rejected it (*id.* at 30-32).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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